06-99002

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES, Plaintiff and Appellant, **v.** **RODERICK Q. HICKMAN, Secretary; STEVEN ORNOSKI, Warden,** Defendants and Appellees.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Northern District of California
Nos. C 06-219 JF and C 06-926 JF RS
The Honorable Jeremy Fogel, Judge

APPELLEES' BRIEF AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

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Michael Morales is scheduled to be executed at San Quentin State Prison on February 21, 2006. He was sentenced to death in 1983, by the Ventura County Superior Court for crimes committed in 1981. To date, every state and federal court to consider his case has denied relief. On January 13, 2006, five days before the execution date was set, Morales filed the present action pursuant to 42 U.S.C. § 1983. Claiming that execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment, he sought injunctive relief to prevent the scheduled execution. The complaint, most of the exhibits, and the memorandum of points and authorities are virtually identical in every significant

respect to those filed in 2004 by Kevin Cooper and Donald Beardslee in their efforts to stop their respective executions. In both of those cases, the district court denied a motion for a temporary restraining order; those orders were affirmed by this Court. *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004); *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005).

Although the district court (which also heard the Cooper and Beardslee cases) again denied injunctive relief, it did so conditioned on the defendants taking steps to insure that Morales will be executed without the unnecessary or wanton infliction of pain. Although defendants agreed to the district court's conditions, Morales remains unsatisfied.[1/] He fails to demonstrate either an abuse of discretion or any basis for a stay of execution.

PROCEDURAL HISTORY

Morales strangled, beat, stabbed, and sexually assaulted Terri Winchell in San Joaquin County on January 8, 1981. He was tried on a change of venue in Ventura County. The jury convicted Morales of first degree murder, rape, and conspiracy, and sentenced him to death in 1983. The California Supreme Court

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1. In agreeing to abide by the district court's condition, defendants did not, nor do they now, concede any constitutional flaws in the state lethal injection protocol or that any prior lethal injection execution was conducted in violation of the Eighth Amendment.

affirmed the judgment in April 1989. *People v. Morales*, 48 Cal.3d 527 (1989). The state court also denied habeas corpus relief, as did the United States District Court for the Central District of California. The denial of federal relief was affirmed by this Court. *Morales v. Woodford*, 388 F.3d 1159 (9th Cir. 2004), *cert. denied* 126 S.Ct. 420 (2005).

At a hearing on January 18, 2006, the Ventura County Superior Court scheduled the execution for February 21, 2006. Morales filed a complaint pursuant to § 1983 on January 13.[2/] He filed his motions for expedited discovery and a temporary restraining order (TRO) on January 17. Following briefing and two hearings the district court denied Morales' motion for injunctive relief on February 14, 2006. ER 365-379. It did so, however, premised on the defendants' agreement either to use only sodium thiopental, the first drug in the state's lethal injection protocol, or to obtain independent verification from a qualified expert that Morales is rendered unconscious by the thiopental before injecting the other two drugs. Defendants agreed to the second condition and have retained the services of two board certified anesthesiologists, one of whom will be next to Morales throughout the execution while the second watches from outside the execution chamber. ER

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2. The original complaint is not in the Excerpts of Record. Morales filed an amended complaint following exhaustion of his administrative remedies on February 10, ER 256-267, and the district court later consolidated the cases. ER 271-272.

316-324. In a second order issued February 16, the district court found that defendants' proposed course complied with the conditions of its previous order. ER 380-385. Morales does not believe this is sufficient and appeals.

STANDARD OF REVIEW

In order to obtain injunctive relief Morales was required to demonstrate (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if preliminary relief was not granted, (3) a balance of hardship favoring him, and (4) advancement of the public interest. *Beardslee*, 395 F.3d at 1067. Alternatively, relief could be granted upon a showing of either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardship tips sharply in Morales' favor. The "greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party." *Id.*

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Harris v. Board of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). A district court abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Id.* The Court's review of a decision on a request for preliminary injunction is "limited and deferential." *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th

Cir. 2003) (en banc). It does not review the merits of the case but is limited to determining whether the district court applied appropriate legal standards and correctly apprehended the law with respect to the underlying issues. *Harris*, 366 F.3d at 760.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONDITIONALLY DENYING MORALES' MOTION FOR INJUNCTIVE RELIEF

Twice in the past two years the district court in this case has denied last-minute challenges to California's procedure for conducting lethal injunction executions. This Court affirmed both orders. *Cooper v. Rimmer*, 379 F.3d at 1029; *Beardslee v. Woodford*, 395 F.3d at 1064. Following briefing and argument in this case the district court identified what it characterized as "anomalies" in past executions, including several which predate both *Cooper* and *Beardslee*. The court nonetheless concluded that Morales was not entitled to a stay of his execution but exercised its equitable powers to fashion an alternative remedy. Although defendants agreed to abide by the district court's conditions, Morales is not satisfied.[3/] Because the district court did not abuse its discretion the conditional

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3. Defendants argued below that habeas corpus rather a § 1983 action is the appropriate procedure for challenging a method of execution, that presentation of the claim was unreasonably delayed, and that Morales had failed to exhaust his administrative remedies when the original complaint was filed. The last defect

denial of injunctive relief should be affirmed.

A. California's Execution Procedure[4/]

An execution is conducted by volunteer employees of the Department of Corrections whose identities remain confidential. Members of the execution team review the procedures on a regular basis and practice extensively in the weeks before a scheduled execution. The IV lines used to deliver the lethal drugs are inserted by either a trained and licensed registered nurse or a medical technician assistant. Although an IV line is set in each arm, only one is actually used for the execution. When the drugs to be used are prepared each syringe is labeled and numbered in the order it will be injected. The syringes are taped to a cart in the correct order.

The drugs used in the execution are delivered as follows:

1. four syringes of thiopental, each containing 1.25 grams for a total of 5 grams or 5000 mg; an extra syringe containing 1.25 grams is prepared as a backup;

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may have been overcome by Morales' subsequent filing of a new complaint once exhaustion was completed. Defendants do not waive any of the procedural objections but suggest their resolution is not essential to decide this appeal.

4. The summary is based on I.P. 770, the protocol governing lethal injection executions, and a written offer of proof made by defendants at the February 9 hearing in district court. ER 502-504.

2. two syringes of pancuronium bromide, each containing 50 mg for a total of 100 mg; an extra syringe containing 50 mg is prepared as a backup;

3. one syringe of potassium chloride containing 100 mEq; an extra syringe containing 100 mEq is prepared as a backup.[5/]

Saline solution is injected between the thiopental and the pancuronium, and between the pancuronium and the potassium. The syringes of saline are also marked and placed on the cart in the appropriate location. After each syringe is injected the empty container is replaced on the cart in the order in which it was delivered.

A heart monitor is attached to the inmate throughout the execution. Death is declared when there is a flat line reading on the EKG.

B. Consciousness

The critical question in resolving an Eighth Amendment challenge to any lethal injection execution is whether the inmate is subjected "to an unnecessary risk of unconstitutional pain or suffering . . . ." *Cooper v. Rimmer*, 379 F.3d at

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5. Except for the amount of thiopental used, California's three-drug protocol is indistinguishable from nearly every other jurisdiction in which lethal injection is an available method of execution. No jurisdiction uses more than five grams of thiopental.

1033. It is undisputed that the five gram dose of thiopental is independently fatal and if delivered properly will quickly render the inmate unconscious and thus incapable of experiencing pain. *See Beardslee v. Woodford*, 395 F.3d at 1071. There is no evidence that once the inmate is unconscious the delivery of either pancuronium or potassium will offset the effects of the thiopental and cause the inmate to regain consciousness.

The dose of 5000 mg is more than ten times the usual dose of 300 to 400 mg used as a general anesthetic during surgery. The surgical dose will cause apnea, or cessation of breathing, within a minute. The larger the dose of thiopental, the longer the subject will suffer apnea. During surgery a respirator is necessary to assist the patient. Although chest wall movement may be observed after delivery of thiopental, such movement is not associated with breathing, nor is it reflective of the subject's state of consciousness. ER 233-234. According to *plaintiff's* expert, having a trained anesthesiologist present during an execution to examine the inmate, monitor vital signs, and determine that the inmate is unconscious after delivery of the thiopental but before the other drugs are administered, "would greatly reduce the possibility of an inhumane execution." ER 287-288.

C. Anomalies In Past Executions

In its order of February 14 the district court acknowledged that to date "no court has found either lethal injection in general or a specific lethal-injection protocol in particular to be unconstitutional." ER 372. It also acknowledged this Court's previous holdings in *Cooper* and *Beardslee* with respect to California's use of lethal injection, noting that the mere risk of accident need not be eliminated from an execution protocol in order for it to be constitutional. ER 373, *citing Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994). Nonetheless, the district court was concerned about the administration of lethal injection in California based on information from the logs of prior executions.

The notations identified by the district court related primarily to the apparent observation of continued breathing after the thiopental was delivered. ER 373-375. Recognizing that there "is no direct evidence that any condemned inmate actually was conscious when pancuronium bromide was injected," the court was nonetheless concerned that some breathing may have continued, thus indicating that the protocol was not functioning as intended. ER 375. It concluded that only a trained anesthesiologist could, in fact, determine when the thiopental is properly administered and the inmate is actually unconscious. ER 378-379. Although Morales had hyptothesized a number of ways in which delivery of the

drugs could have been compromised, there is no showing in the record that during any execution an IV was improperly established, an IV became dislodged as the drugs were injected, the drugs flowed onto the floor, or that the entire (concedely fatal) dose of thiopental was not delivered to the inmate.[6/]

D. The District Court's Conditional Order

Despite potential issues resulting from the perceived anomalies in past executions, the district court concluded that Morales was not entitled to a stay of execution. Instead, the court exercised its equitable powers to preserve both the State's interest in proceeding with the execution of a twenty-five-year-old murder judgment, while also preserving Morales' right to not be subjected to an undue risk of extreme pain during the execution. To that end it denied an injunction conditioned upon defendants' implementation of one of two modifications to the state's protocol. ER 376. Specifically, defendants could either agree to execute Morales by using only thiopental, or to have an anesthesiologist or similarly qualified person present to verify that Morales was unconscious before the

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6. The court also noted that some inmates had been given a second dose of potassium chloride before death was pronounced which, the court suggested, raised additional concerns about the manner in which the state protocol is administered. ER 375-376. In each of those cases the inmate exhibited a fatal, but not flat line, EKG reading before given the additional potassium. The extra dose was simply intended to eliminate additional, unnecessary delay in pronouncing death. ER 175-180, 509-512. In any event, use of a second dose of potassium has no relevance to the issue of whether the inmates were conscious.

pancuronium or potassium was delivered. ER 377-379. Defendants elected the second alternative and identified two licensed, board-certified anesthesiologists who will be present at the execution to monitor Morales in accordance with the requirements of the district court's order. ER 317-320. After reviewing the credentials of the experts in camera the district court found they were qualified and affirmed that defendants could proceed with the execution under the terms of the court's conditional order. ER 380-385.

E. The Denial Of Injunctive Relief Pursuant To The Conditional Order Was Not An Abuse Of Discretion

Morales, who had insisted in his TRO application that he was "not attempting to prevent the state from executing him," but was merely "requesting that the Court ensure that he is not executed in an unconstitutional manner," ER 28, complains that the district court "unilaterally devised itself without benefit of an evidentiary hearing" a modification to the state execution protocol, AOB at 3, and criticizes the court's "ever-evolving creation of a last-minute revision of the protocol in a desperate attempt to make sure Mr. Morales is executed on Defendant's schedule . . . ." AOB at 11. Not so. In fact, the district court took Morales at his word and conditioned the execution on the application of procedures recommended by his own expert.

In his motion for temporary restraining order (TRO) Morales objected to

the state lethal injection protocol because "it creates a significant and substantial risk that the inmate will experience a prolonged agonizing death." ER 12. He professes concern for the risk that he "will not be anesthetized" before he is injected with the second and third drugs in the execution sequence. ER 17. Because all of the experts agree that proper delivery of thiopental in the amount used by California will result in unconsciousness, and that an unconscious person cannot experience pain, the risk perceived by Morales is that a sufficient amount of the thiopental will not be delivered to insure unconsciousness throughout the execution. Morales made clear his position in the TRO application: "Michael Morales is not attempting to prevent the State from executing him. He is simply demanding the constitutional protection to which he is entitled, by requesting that this Court ensure that he is not executed in an unconstitutional manner." ER 28. In short, he *asked* the district court to ensure that he is rendered and remains unconscious throughout the execution.

Morales acknowledges in his brief that it is impossible to determine with certainty before the fact whether a particular inmate will suffer unnecessary pain. AOB at 39-40. During argument before the district court counsel for Morales complained that there was no provision for determining whether the inmate was conscious before proceeding from the thiopental to the other drugs. ER 480.

Analogizing to the procedures used by veterinarians counsel asserted there should be "somebody touching the body. We have to have somebody observing." Asked by the court whether that could be a prison guard counsel stated, "Somebody with some training . . . ." Then asked whether the person had to have medical training, counsel responded, "I don't know that it does, but, again, that's for the state to figure out." ER 482.

Following the argument, on February 13 the district court asked for defendants' views on whether it would be feasible to proceed with the execution either (1) using only thiopental or (2) by implementing some independent means insure that Morales was unconscious before receiving pancuronium or potassium. ER 269-270. Defendants responded by observing that an execution adopting the first option could take much longer. As to the second option, defendants offered to have the warden remain in the chamber and assess Morales' consciousness as the execution proceeded. ER 273-274.

In response Morales offered a declaration from his expert, Dr. Mark Heath, who opined that the "assessment of anesthetic depth" is "inherently a complex task that requires the real-time and continuous integration of multiple lines of evidence and information." Thus, in his opinion, someone with training as an anesthesiologist would be required to examine the prisoner during the

execution. Monitoring by a properly qualified individual "would meet the standards of care for general anesthesia, would meet the standard of care for veterinary euthanasia by potassium chloride administration, and could, if properly done, reasonably 'insure that [Morales] is in fact unconscious.'" ER 286-287. In short, according to Morales himself, the presence of such an expert would ensure a humane execution, which is precisely the relief he sought in the complaint and TRO application, and he later described as "exactly that which plaintiff alleges should be occurring at San Quentin." ER 280.

On February 14 the district court issued its order denying injunctive relief if defendants adopted one of the two alternatives suggested in the February 13 inquiry. The Court made clear, however, that the second option required a person "with formal training and experience in the field of general anesthesia," ER 378, again precisely tailoring the order to the demands of Dr. Heath. Defendants agreed to the follow the second approach and identified two licensed, board-certified anesthesiologists who will be present throughout the execution to monitor Morales. ER 317-320. In a supplemental filing defendants explicitly stated that one of the doctors would be in the chamber with Morales throughout the execution and would use "whatever equipment or other techniques he deems medically appropriate" to assess and monitor consciousness per the district court's order. ER 335.

In response to the court's conditional order, Morales did not question the court's authority to provide such relief, nor did he suggest that the presence of an anesthesiologist would be inadequate to assess consciousness. Rather, he expressed concern about the qualifications of the doctors and the degree of cooperation they would receive from defendants. ER 325-329. After reviewing those complaints and the assurance provided by defendants, the district court referenced the explicit requirements of its order, noting that it was "influenced to a very large extent by the opinions of Plaintiff's own medical expert, Dr. Mark Heath." The court then quoted from the February 14 declaration discussed above, stating that it had "intentionally fashioned its order so that the anesthesiologists would perform their duties precisely as contemplated by Dr. Heath." ER 383-384.

Despite Morales' ever-evolving dissatisfaction, it is clear that the district court did not abuse its discretion by conditionally denying injunctive relief. Morales certainly cannot be heard to complain that the court's order was based on erroneous findings of fact given that it was expressly based on a procedure proposed by Morales' own expert. As set forth in the complaint and other pleadings, Morales sought assurance that his constitutional right to be free of wanton and unnecessary infliction of pain during his execution by lethal injection will not be violated. Because there is no doubt that he cannot and will not suffer

pain if unconscious, the remedy crafted by the district court though hardly necessary as a constitutional matter provides Morales with precisely the form of assurance he demanded. He is entitled to that much, but he is surely entitled to no more.

CONCLUSION

For the reasons stated above the order denying injunctive relief should be affirmed and the motion for a stay should be denied.

Dated: February 17, 2006

Respectfully submitted,

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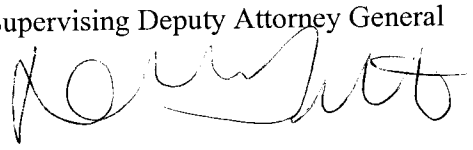

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: February 17, 2006

Respectfully submitted,

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